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No.

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In the Supreme Court of the United States

October Term, 1983

STATE OF KANSAS,
Respondent,

vs.

JOSEPH WILLIAM CANTRELL,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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41 pp

QUESTIONS PRESENTED

1. Whether judicial construction of a state rape statute eliminating the requirement of criminal intent, or necessary *mens rea,* renders the statute constitutionally infirm for vagueness and overbreadth in violation of petitioner's rights to due process of law under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

2. Whether judicial elimination of criminal intent as a necessary element of the crime of rape renders the judicial construction of such statute in effect an *ex post facto* law prohibited in Article 1, Section 10 of the United States Constitution.

3. Whether a sentence of five years to twenty years for violation of a state statute which does not require a bad intent or *mens rea,* is cruel and unusual punishment proscribed by the Eighth Amendment to the United States Constitution.

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No.

In the Supreme Court of the United States

October Term, 1983

STATE OF KANSAS,
Respondent,

vs.

JOSEPH WILLIAM CANTRELL,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

Joseph William Cantrell, by and through Randolph G. Austin and Mary Stuckey Cofran, two of his attorneys of Speer, Austin, Holliday & Ruddick, Olathe, Kansas, petition for a writ of *certiorari* to review the judgment of the Supreme Court of the State of Kansas.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Kansas (App. A, *infra*, p. A1) is reported at 234 Kan. 426, ... P.2d ..... (1983). The opinion of the Supreme Court of the State of Kansas denying petitioner's Motion for Rehearing (App. B, *infra*, p. A17) was not reported.

JURISDICTION

The judgment of the Supreme Court of the State of Kansas (App. A, *infra*, p. A1) was entered on December 2, 1983. A Motion for Rehearing was denied on January 20, 1984 (App. B, *infra*, p. A17). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3), as involving a state statute rendered repugnant to the protections of the Constitution of the United States by judicial construction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall . . . be deprived of life, liberty . . . without due process of law . . . .

2. The Sixth Amendment of the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . . and to be informed of the nature and cause of the accusations . . . .

3. The Eighth Amendment of the United States Constitution provides in relevant part:

> [N]or [shall] cruel and unusual punishment [be] inflicted.

4. The Fourteenth Amendment of the United States Constitution provides in relevant part:

> [N]or shall any State deprive any person of life, liberty . . . without due process of law; nor deny to any

person within its jurisdiction equal protection of the laws.

5. Article 1, Section 10 of the United States Constitution provides in relevant part:

> No State shall . . . pass any . . . *ex post facto* Law . . . .

6. Kansas Statutes Annotated §21-3201 provides in relevant part:

> [A] criminal intent is an essential element of every crime defined by this code. Criminal intent may be established by proof that the conduct of the accused person was willful or wanton. Proof of willful conduct shall be required to establish criminal intent . . . . (2) willful conduct is conduct that is purposeful and intentional and not accidental. As used in this code, the terms "knowing," "intentional," "purposeful," and "on purpose" are included within the term "willful."

7. Kansas Statutes Annotated [1969] §21-3502 provides in relevant part:

> [1.] Rape is the act of sexual intercourse committed by a man with a woman not his wife, and without her consent when committed under any of the following circumstances:
>
> [a.] When a woman's resistance is overcome by force or fear.
>
> [2.] Rape is a class B felony.

8. Kansas Statutes Annotated §21-4501 provides in relevant part:

> For the purpose of sentencing, the following classes of felonies and terms of imprisonment authorized for each class are established:

(b) Class B, the sentence for which shall be an indeterminate term of imprisonment, the minimum of which shall be fixed by the court at not less than five (5) years nor more than fifteen (15) years and the maximum of which shall be fixed at not less than twenty (20) years nor more than life.

STATEMENT

Petitioner, Joseph William Cantrell, was charged with the crime of rape as prohibited under Kansas law. Petitioner was charged with rape after sexual intercourse with the prosecuting witness, Ms. Sandra Brandt, on April 27, 1982. The relevant statute, K.S.A. [1969] 21-3502 prohibited such intercourse when the woman's resistance was overcome by force *or* fear. The matter was tried to a jury in November, 1982.

The trial evidence revealed the parties had become acquainted while "bar-hopping," and the act of sexual intercourse occurred while in transit from one drinking establishment to another. The petitioner and complaining witness were in the same group of revelers, and the prosecutrix voluntarily accepted petitioner's offer of a ride to another bar for more drinking and dancing. The petitioner stopped his vehicle a few blocks from their destination, and engaged in sexual intercourse with the prosecutrix. The prosecutrix testified that she resisted the intercourse by crying and asking petitioner not to engage in intercourse with her. By her testimony, the petitioner did not threaten her or strike her. Petitioner did not have a weapon or threaten any type of bodily injury. Size of the parties was not a determinative factor. Petitioner did not use angry words or even raise his voice. Petitioner did not intimidate the prosecutrix, and only

kissed her in an "aggressive" manner. Petitioner maintained at all times that the intercourse was consensual, and that he was first informed of the lack of consent upon arrival at their destination where they rejoined their group (App. A, *infra,* pp. A4-A5).

The nature of petitioner's intent at the time of intercourse was thus a central issue in the trial.

The jury was instructed on the statutory elements of rape and on the nature of the intent required for conviction, defined as "willful and purposeful and not accidental." (App. A, *infra,* p. A10). Petitioner was subsequently convicted. Under Kansas statutes, rape is a class B felony, and petitioner was accordingly sentenced to imprisonment for a minimum period of five (5) years and a maximum period of twenty (20) years.

Post-conviction motions were filed, and upon denial, the conviction appealed to the state's highest court.[1] On appeal,[2] the petitioner challenged as clearly erroneous the trial court's failure to instruct *mens rea* or specific criminal intent,[3] which had previously been held by the Kansas Supreme Court to be a necessary element of the crime of rape.[4] In the event the criminal intent require-

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1. Pursuant to K.S.A. 60-2101(a), all appeals from convictions of class A and B felonies are to be heard before the state's highest court, the Kansas Supreme Court. See, Kansas Constitution, Article 3, §1.

2. Petitioner also raised issues of sufficiency of the evidence to support the verdict and alleged error in sequestration of witnesses violations. Those issues do not affect the constitutionality of K.S.A. 21-3502(a) and are thus not relevant to this Petition.

3. Petitioner's trial counsel made no objections to the given instructions. However, K.S.A. 22-3414 allows appellate review of challenged jury instructions in criminal trials where such instructions were "clearly erroneous," despite failure of trial counsel to timely object.

4. In previous Kansas decisions, the crime of rape was held to require a specific intent to commit rape on the part of the accused. *State v. Gonzales,* 217 Kan. 159, 161, 535 P.2d 988 (1975); *State v. Hampton,* 215 Kan. 907, 909, 529 P.2d 127 (1974).

ment was abrogated, petitioner alternatively challenged the rape statute as constitutionally infirm for vagueness.

In review, the Kansas Supreme Court reversed its previous decisions, holding for the first time that the accused's state of mind was *not* an element of the crime of rape when the woman's resistance is overcome by force or fear. Rather, the perception of the victim was held to be controlling. Nor did its own confusion on the necessary elements of the crime dissuade the Kansas court from finding the statute sufficiently specific to be "readily understandable by persons of common intelligence and as such . . . constitutional."[5]

Petitioner timely moved the court to reconsider its decision.[6] In that motion, petitioner restated the argument that lack of criminal intent as a necessary element of the crime rendered the statute unconstitutionally vague.[7]

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5. At 234 Kan. 434-35, the Court cited in reliance its previous decision of *State v. Huffman*, 228 Kan. 186, 612 P.2d 630 (1980):

> "The test to determine whether a criminal statute is unconstitutionally vague and indefinite is whether its language conveys a sufficiently definite warning as to the conduct proscribed when measured by common understanding and practice. A statute which either requires or forbids the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application is violative of due process." Syl. ¶5.

6. K.S.A. 60-2701a, Supreme Court Rule No. 7.06.

7. The necessity of an element of *mens rea* or criminal intent in crimes of common law origins was argued as a due process requirement under previous decision of this court. *United States v. Bailey*, 444 U.S. 394, 62 L.Ed.2d 575, 100 S.Ct. 624 (1980); *United States v. United States Gypsum*, 438 U.S. 422, 57 L.Ed.2d 854, 98 S.Ct. 2864 (1978); *Smith v. California*, 361 U.S. 147, 4 L.Ed.2d 205, 80 S.Ct. 215 (1959), reh. denied, 361 U.S. 950, 4 L.Ed.2d 383, 80 S.Ct. 399 (1960); *Scull v. Commonwealth of Virginia*, 359 U.S. 344, 353, 3 L.Ed.2d 865, 79 S.Ct. 838 (1959); *Lambert v. California*, 355 U.S. 225, 2 L.Ed.2d 228, 78 S.Ct. 240, reh. denied, 355 U.S. 937, 2 L.Ed.2d 419, 78 S.Ct. 410 (1957); *Morisette v. United States*, 342 U.S. 246, 263, 96 L.Ed. 288, 72 S.Ct. 240 (1952).

Petitioner additionally argued that post-conviction elimination of the element of criminal intent rendered the rape statute, K.S.A. 21-3502, constitutionally overbroad, as prohibiting otherwise innocent and protected conduct.[8] Further, the court's decision eliminating the prior element of criminal intent and affirming conviction constituted a judicial enlargement of criminal liability in contradiction of the *ex post facto* prohibitions of Article 1, Section 10 of the United States Constitution.[9] Petitioner finally argued that elimination of criminal intent rendered sentencing under the rape statute cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments of the United States Constitution, as failing to consider the degree of culpability necessarily dependent upon the criminal intent, or lack thereof, motivating the proscribed conduct.

Petitioner's Motion for Rehearing and Reconsideration was overruled without opinion on January 20, 1984 (App. B, *infra*, p. A17).

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8. See, *State v. Huffman*, 228 Kan. 186, Syl. ¶3, 612 P.2d 630 (1980), distinguishing overbreadth from vagueness, as making "conduct punishable which under some circumstances is constitutionally protected from criminal sanctions."

9. See, *Bouie v. Columbia*, 378 U.S. 347, 353-54, 12 L.Ed.2d 894, 84 S.Ct. 1697 (1964).

REASONS FOR GRANTING PETITION

The case presents questions of Constitutional importance amplified by public policy considerations. Of paramount importance is the elimination of criminal intent as an element of the crime of rape. The issue's importance extends beyond the present case and beyond the jurisdictional boundaries of the State of Kansas, particularly when viewed in light of today's sexual mores juxtaposed with the rising tide of public concern and legislative reform in Kansas and other jurisdictions on the issue of rape. Issues of judicial construction constituting prohibited *ex post facto* culpability and rendering otherwise appropriate sentencing void as cruel and unusual punishment also extend beyond the perimeters of this particular case.

1. Petitioner was convicted of the crime of rape, statutorily defined as "the act of sexual intercourse committed by a man with a woman not his wife, and without her consent when . . . a woman's resistance is overcome by force or fear." K.S.A. [1969] 21-3502(1)(a). Prior to its decision in this instance, the Kansas Supreme Court interpreted this statute to require a specific criminal intent on the part of the accused to commit the act of sexual intercourse, despite perceived resistance and lack of consent. *State v. Gonzales,* 217 Kan. 159, 161, 535 P.2d 988 (1975); *State v. Hampton,* 215 Kan. 907, 909, 525 P.2d 127 (1974). The appellate court's elimination of the specific intent requirement violates the protections of the Sixth Amendment requiring the accused to be informed of the nature and cause of the accusations and the due process clauses of the Fifth and Fourteenth Amendments as failing to apprise persons of ordinary intelligence of the conduct which is prohibited. Further, such judicial legislation infringes upon Constitutionally protected privacy, associa-

tional, and liberty rights protected by the Fourteenth Amendment.

(a) Specific criminal intent has long been considered a requisite element of crimes originating at common law. The *mens rea* prerequisite to criminal liability is considered essential to the Constitutional requirements that the criminally accused be adequately apprised of prohibited conduct. *Lambert v. California,* 355 U.S. 225, Syl. ¶6, 2 L.Ed.2d 228, 78 S.Ct. 240, reh. denied, 355 U.S. 937, 2 L.Ed.2d 419, 78 S.Ct. 410 (1957). In the more recent case of *United States v. Bailey,* 444 U.S. 394, 405, 62 L.Ed.2d 575, 587, 100 S.Ct. 624 (1980), the common law general intent was equated with "knowledge" and contrasted with "specific intent", which was equated with "purpose."

In its decision, the Kansas court distinguished between specific and general criminal intent and then abrogated the necessity of *any* criminal intent in the crime of rape. The Kansas court specifically adopted the rationale stated in Justice Prager's dissenting opinion in *State v. Gonzales, supra,* 217 Kan. at 162, holding the woman's intent and state of mind as being *solely* determinative of whether intercourse constituted rape.

If the crime of rape is determined only by the perception of the victim, it is impossible for any man, of common intelligence or otherwise, to determine with any degree of certainty in advance of accusation his sex partner's perception. See, *City of Columbus v. Scott,* 47 Ohio App. 2d 287, 353 N.E.2d 858 (1975) (statute involving two separate intentions held unconstitutionally vague). Thus, the judicial construction of the Kansas rape statute eliminating any requirement of *scienter* or *mens rea* "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute," and "is so indefinite that it encourages arbitrary and erratic arrests

and convictions." *Colautti v. Franklin,* 439 U.S. 379, 390-91, 58 L.Ed.2d 596, 606, 99 S.Ct. 675 (1979).

(b) Merging with the Constitutional infirmity for vagueness is the due process violation for overbreadth. Sexual relations between consenting adults have been given Constitutional status as associational freedoms and privacy rights guaranteed by the First, Fourth and Fifth Amendments and protected from state infringement by the due process clause of the Fourteenth Amendment. Additionally, personal freedom and privacy have been deemed inherent in the Fourteenth Amendment due process protections as fundamental liberties. See, *Roe v. Wade,* 410 U.S. 113, 35 L.Ed.2d 147, 93 S.Ct. 705 (1973); *Eisenstadt v. Baird,* 405 U.S. 438, 31 L.Ed.2d 349, 95 S.Ct. 1029 (1972); *Stanley v. Georgia,* 394 U.S. 557, 564, 22 L.Ed.2d 542, 549, 89 S.Ct. 1243 (1969); *Skinner v. Oklahoma,* 316 U.S. 535, 541, 86 L.Ed. 1655, 1660, 62 S.Ct. 1110 (1942). A statute which intrudes upon personal liberties subject to Constitutional safeguards requires even greater specificity and certainty to avoid Constitutional invalidity for overbreadth. See, *Grayned v. City of Rockford,* 408 U.S. 104, 114-15, 33 L.Ed.2d 222, 230, 92 S.Ct. 2294 (1972); *NAACP v. Alabama,* 377 U.S. 288, 307, 12 L.Ed.2d 325, 84 S.Ct. 1302 (1964).

Without undermining the importance of personal choice in sexual matters, the elimination of *any* element of criminal intent on the part of the accused imposes serious Constitutional problems with the statute in question, as well as the statutes of other jurisdictions prohibiting sexual offenses. The Kansas statute has been amended, effective July 1, 1983, to eliminate the spousal exception from criminal liability for nonconsensual intercourse. Other states likewise recognize the crime of rape by a man committed against his wife.[10] The public policy

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10. See, West's California Penal Code §262; Connecticut Penal Code §53a-706; *State v. Smith,* 85 N.J. 193, 426 A.2d 38, 24 A.L.R. 4th 90 (1981).

preference for the marriage relationship[11] will be greatly undermined if a man, in the eyes of the law, can rape his wife with no evil intention other than the intention to engage in lawful, marital intercourse, although his wife perceives his conduct as "rape" because of an undisclosed withholding of "consent" or of tacit submission to perceived "force." The total elimination of any criminal intent on the part of the defendant charged with rape renders not only Petitioner's conviction Constitutionally void for overbreadth, but also has far reaching implications for individual and marital privacy rights.

2. In *Bouie v. Columbia,* 378 U.S. 347, 352, 12 L.Ed.2d 894, 899, 84 S.Ct. 1697 (1964), this Court recognized that unanticipated and retroactive enlargement of statutory criminal liability by judicial construction not only violates due process notice requirements, but also violates the Article 1, Section 10, United States Constitution prohibition against *ex post facto* laws. To allow such enlargement with retrospective application in the present case opens the door to future violations and to the steady erosion of principles protecting the liberty of all individuals, and the rights of all to be given adequate notice of conduct which may result in criminal liability.

3. The Kansas rape statute, K.S.A. 21-3502, judicially amended to eliminate criminal intent as a necessary element of the crime, renders sentencing thereunder also violative of the Fourteenth Amendment due process requirements. See, *United States v. Vatchelder,* 442 U.S. 114, 123, 60 L.Ed.2d 755, 764, 99 S.Ct. 2198 (1979); *Scull v. Commonwealth of Virginia,* 359 U.S. 344, 353, 3 L.Ed.2d 865, 870-71, 79 S.Ct. 838 (1959). Additionally, imposition

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11. See, e.g., *Zablocki v. Redhail,* 434 U.S. 374, 54 L.Ed.2d 618, 98 S.Ct. 673 (1978); *Loving v. Virginia,* 388 U.S. 1, 12, 18 L.Ed.2d 1010, 1018, 87 S.Ct. 1817 (1967).

of sentence for violations devoid of criminal intent violates the Eighth Amendment prohibitions against cruel and unusual punishment. *United States v. Bailey,* 444 U.S. 394, 405-06, 62 L.Ed.2d 575, 588, 100 S.Ct. 624 (1980); *Morisette v. United States,* 342 U.S. 246, 251, 96 L.Ed. 288, 294, N. 5, 72 S.Ct. 240 (1952). As with other Constitutional protections, individual rights and guarantees must be zealously protected and defended to preserve the integrity of those Constitutional provisions. Accordingly, enforcement of Petitioner's rights against due process infringements by sentencing without adequate notice of proscribed conduct, and apportionment of sentence without regard to criminal culpability or intent, is essential to preserve those guarantees to all.

CONCLUSION

The petition for writ of *certiorari* should be granted, with these issues of Constitutional import resolved by this Court.

Respectfully submitted,

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APPENDIX

APPENDIX A

No. 55,375

STATE OF KANSAS,
Appellee,

v.

JOSEPH WILLIAM CANTRELL,
Appellant.

SYLLABUS BY THE COURT

1. In considering the sufficiency of the evidence the standard of review on appeal is: Does the evidence when viewed in the light most favorable to the prosecution convince the appellate court that a rational factfinder could have found the defendant guilty beyond a reasonable doubt?

2. The testimony of the prosecutrix need not be corroborated to sustain a conviction for rape in this state; there may be a conviction on the uncorroborated evidence of the prosecutrix if it is believed by the jury. (Following *State v. Sanders,* 227 Kan. 892, Syl. ¶ 2, 610 P.2d 633 [1980].)

3. Violation of a court order separating witnesses does not of itself disqualify a witness from testifying, and the trial court in its discretion may permit the witness to testify.

4. It is the duty of trial counsel to advise their witnesses of any order of separation, sequestration, or other restrictions that the court has seen fit to impose upon the witnesses' conduct.

5. Punishment for contempt of court may, in a proper case, be appropriate for a witness who has violated a separation or sequestration order of the court and in certain instances for an attorney who has failed to advise his or her witnesses of the court's orders.

6. No party may assign as error the giving or failure to give an instruction unless he or she objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he or she objects and the grounds of his or her objection, unless the instruction is clearly erroneous.

7. The distinction between a general intent crime and a crime of specific intent is whether, in addition to the intent required by K.S.A. 21-3201, the statute defining the crime in question identifies or requires a further particular intent which must accompany the prohibited acts.

8. The elements of intent required for various statutory crimes vary according to the particular crime. Where intent is a required element of the crime it must be included in the charge and in the instructions of the court covering the separate elements of that particular crime. (Following *State v. Clingerman,* 213 Kan. 525, 516 P.2d 1022 [1973].)

9. Rape as defined in K.S.A. 21-3502 does not require, as one of the statutory elements of the offense, a specific intent on the part of the defendant to commit rape and therefore there is no necessity to instruct the jury on such a specific intent. Language to the contrary in *State*

v. Carr, 230 Kan. 322, 634 P.2d 1104 (1981), and in *State v. Hampton,* 215 Kan. 907, 529 P.2d 127 (1974), is overruled.

10. This court adheres to the proposition that the constitutionality of a statute is presumed, that all doubts must be resolved in favor of its validity, and before the statute may be stricken down, it must clearly appear the statute violates the constitution. Moreover, it is the court's duty to uphold the statute under attack, if possible, rather than defeat it, and if there is any reasonable way to construe the statute as constitutionally valid, that should be done. (Following *State v. Huffman,* 228 Kan. 186, Syl. ¶1, 612 P.2d 630 [1980].)

11. The test to determine whether a criminal statute is unconstitutionally vague and indefinite is whether its language conveys a sufficiently definite warning as to the conduct prescribed when measured by common understanding and practice. A statute which either requires or forbids the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application is violative of due process. (Following *State v. Huffman,* 228 Kan. 186, Syl. ¶5, 612 P.2d 630 [1980].)

12. K.S.A. 21-3502 (as it existed prior to L.1983, ch. 109 §2) was not so vague and indefinite that persons of common intelligence must necessarily guess at its meaning and therefore was not unconstitutional on the asserted grounds.

Appeal from Johnson district court, GERALD L. HOUGLAND, judge. Opinion filed December 2, 1983. Affirmed.

Randolph G. Austin and *Mary Stuckey Cofran,* of Speer, Austin, Holliday, Lane & Ruddick, of Olathe, argued the cause and were on the brief for appellant.

Larry McClain, assistant district attorney, argued the cause, and *Robert T. Stephan,* attorney general, and *Dennis W. Moore,* district attorney, were with him on the brief for appellee.

The opinion of the court was delivered by

HOLMES, J.: Joseph William Cantrell appeals from his conviction by a jury of one count of rape. K.S.A. 21-3502. The appellant raises several points of alleged error in the trial court proceedings and also asserts there was insufficient evidence to support the conviction. After carefully considering all points we affirm the conviction.

The first point to be considered is whether there was sufficient evidence to support the conviction. Appellant did not deny that he had sexual intercourse with the victim, Mrs. B., on the night of April 26, 1982. Mrs. B., a divorcee and a resident of Colorado had been visiting a friend, Jackie Larson, in Kansas City, Missouri. On Sunday, April 26, 1982, they went shopping in the Plaza area of Kansas City and late in the afternoon started visiting various restaurants and bars. Early in the evening they met John Mullane, an acquaintance of Miss Larson, at the Bristol Bar and Grill. Mullane introduced the two ladies to several people including Joseph Cantrell. Mrs. B. had some conversation with Cantrell at that time although he left the bar shortly thereafter. Later in the evening Mrs. B., Jackie Larson and John Mullane left the Bristol to go to Plaza III, another bar in the area. On the way

they encountered Joseph Cantrell who was walking to his car to go home. Jackie Larson asked him to join them and he did. The group stayed at Plaza III until closing time which was around 11:45 p.m. and then decided to go to the Clarette Club in Johnson County, Kansas, to continue their evening of drinking and dancing. It was decided that Mrs. B. would ride with Cantrell and Larson would ride with Mullane, and they would then meet at the Johnson County club.

On the way to the Clarette Club, Cantrell pulled off onto a side street where the alleged rape took place in the front seat of his El Camino truck. Appellant contends the sexual intercourse was consensual while Mrs. B. contends it was rape. It would serve no useful purpose to detail the two versions of the event. Suffice it to say Mrs. B. testified that she resisted and struggled with the defendant; that she was crying; and that she begged the defendant to stop, although she admitted that he made no threats, did not strike her, had no weapon and did not curse her or raise his voice. Her clothes were not ripped or torn and she suffered no bruises or other evidence of trauma. She made no attempt to scream, honk the horn or leave the vehicle. Upon completion of the act, the two proceeded on to the Clarette Club where they joined John Mullane and Jackie Larson. Mrs. B. told Jackie Larson that she had been raped by defendant. Mrs. B., Larson and Mullane then left the club and Mrs. B. and Larson returned to Larson's home at which time they contacted the police.

K.S.A. 21-3502 (amended L.1983, ch.109, §2) provided:

> "(1) Rape is the act of sexual intercourse committed by a man with a woman not his wife, and without her consent when committed under any of the following circumstances:

(a) *When a woman's resistance is overcome by force or fear;*

(b) When the woman is unconscious or physically powerless to resist; or

(c) When the woman is incapable of giving her consent because of mental deficiency or disease, which condition was known by the man or was reasonably apparent to him; or

(d) When the woman's resistance is prevented by the effect of any alcoholic liquor, narcotic, drug or other substance administered to the woman by the man or another for the purpose of preventing the woman's resistance, unless the woman voluntarily consumes or allows the administration of the substance with knowledge of its nature.

(2) Rape is a class B felony." (Emphasis added.)

In the instant case the charging instrument stated "when her resistance was overcome by force *and* fear" rather than force *or* fear. As a result the trial court instructed the jury that they must find the victim's resistance was overcome by both "force and fear."

In considering the sufficiency of the evidence, the standard of review on appeal is: Does the evidence when viewed in the light most favorable to the prosecution convince the appellate court that a rational factfinder could have found the defendant guilty beyond a reasonable doubt? *State v. Matlock,* 233 Kan. 1, 660 P.2d 945 (1983). In *State v. Sanders,* 227 Kan. 892, 610 P.2d 633 (1980), we held:

"The testimony of the prosecutrix need not be corroborated to sustain a conviction for rape in this state; there may be a conviction on the uncorroborated

evidence of the prosecutrix if it is believed by the jury." Syl. ¶ 2.

While the evidence in this case is not strong on the element of overcoming the resistance of the victim, we have concluded that the testimony of Mrs. B. was sufficient to meet the test set forth in *Matlock*. Her testimony that she physically resisted the defendant is clear and the jury could have concluded from her actions that her resistance was also overcome by fear. See *State v. Hacker*, 197 Kan. 712, 421 P.2d 40 (1966), *cert. denied*, 386 U.S. 967 (1967). The jury had the opportunity to view the witnesses and to hear the evidence and evidently believed the testimony of Mrs. B. rather than that of the defendant.

Appellant's next point on appeal is that the trial court erred in refusing to strike the testimony of Mrs. B. as she had violated the court's sequestration order. The court, at defendant's request, had entered a sequestration order which the prosecutor failed to relay to his witnesses. During the evening, after the first day of trial, Mrs. B., who had not yet testified, discussed the case with her friend Jackie Larson, who had testified that day. On cross-examination defense counsel discovered this violation, and immediately moved to strike the prosecutrix' direct testimony and to prevent her from testifying further. The prosecutor responded that his failure to inform the witnesses of the court order was inadvertent, and as the victim had previously testified at the preliminary hearing her testimony was "locked in," resulting in no prejudice to the defendant. The court reserved its ruling on defendant's motion, excused the jury, and permitted counsel to inquire of the witness as to the scope of the actual communication. After hearing her testimony the judge read the transcript of the preliminary hearing and concluded:

"[T]here has been no substantial variance nor material alteration of testimony in this matter. That, if

anything, the witness' testimony at trial is, as might be anticipated, less detailed than the testimony presented at preliminary hearing.

"The Court finds only the most minor of variances from the testimony earlier given at preliminary hearing. I have made a few notes of minor time variances that appear from the preliminary hearing to the trial of the case and trial testimony. Obviously, simple time discrepancies, unless time is a critical factor, [are] of no great consequence.

"I have reviewed with particular interest necessarily the witness' testimony about the precise actions, statements, etc., that relate to the parked car or parked Camino episode which, of course, the Court must view as the critical time element involved in the matter and whether or not any variance of a substantial matter occurred in that precise area.

"The Court finds virtually no variance in that testimony. Any variance that there is in terms of trial testimony as opposed to preliminary hearing in the Court's view inures to the defendant's benefit rather than detriment because it is, in the Court's view, substantially less detailed.

"The Court necessarily then finds that no prejudice has resulted to the defendant from the communication of whatever nature and, of course, that has been permitted to be explored by counsel by examining the principal witness, [Mrs. B] in open court outside the presence of the jury and following counsel's very proper objection."

The jury was called back into court, and defense counsel, on further cross-examination of Mrs. B., fully explored the two witnesses' conversation and any discrepancies in the victim's pretrial and trial testimony.

The well-established rule in Kansas is that violation of a court order separating witnesses does not of itself disqualify a witness from testifying, and the trial court in its discretion may permit the witness to testify. *State v. Blocker,* 211 Kan. 185, 505 P.2d 1099 (1973); *State v. Edwards,* 209 Kan. 696, 498 P.2d 53 (1972); *State v. Henderson,* 205 Kan. 231, 468 P.2d 136 (1970); *State v. Trotter,* 203 Kan. 31, 453 P.2d 93 (1969); *Barber v. Emery,* 101 Kan. 314, 167 Pac. 1044 (1917); *State v. Falk,* 46 Kan. 498, 26 Pac. 1023 (1891); *Davenport v. Ogg,* 15 Kan. 363 (1875). We find no abuse of discretion in the court's ruling.

Before leaving this point, however, we pause to note our increasing concern over the number of inadvertent failures of attorneys to communicate sequestration and separation orders to their own witnesses. See *State v. Handley,* 234 Kan. ....., ... P.2d ..... (this day decided.) In the present case, the trial judge addressed the following remarks to the prosecutor:

> "I will instruct you that in the future it is my view that as an officer of the Court you do have an affirmative obligation, even without direction specifically by the Court, to admonish witnesses that you anticipate calling for trial in advance of that testimony as to any restrictions upon their discussions that the Court has seen fit to impose."

We emphatically agree. We have previously recognized that any person violating a separation order could be punished therefor by contempt, although the admission of the testimony is generally proper unless a party to the action participated in the guilt of the witness. *State v. Carney,* 216 Kan. 704, 709-710, 533 P.2d 1268 (1975). In certain instances contempt proceedings against an attorney for failing to properly advise the witnesses of a sequestration order may be an appropriate sanction.

Appellant's final contention is that the trial court erred in failing to instruct on the requisite felonious intent under K.S.A. 21-3502. We note at the outset that defendant lodged no objections to the instructions and unless the instructions given were clearly erroneous appellant may not now claim error. K.S.A. 22-3414(3); *State v. Jones,* 233 Kan. 112, 115, 660 P.2d 948 (1983).

The instructions submitted to the jury included the following:

> "Instruction No. 10. In order for the defendant to be guilty of the crime charged the State must prove beyond a reasonable doubt that his conduct was intentional. Intentional means willful and purposeful and not accidental.
>
> "Intent, or lack of intent, is to be determined or inferred from all of the evidence in the case.
>
> "Instruction No. 11. The defendant is charged with the crime of rape. The defendant pleads not guilty.
>
> "To establish this charge each of the following claims must be proved.
>
> 1. That the defendant had sexual intercourse with [Mrs. B.];
>
> 2. That [Mrs. B.] was not the defendant's wife;
>
> 3. That the act of sexual intercourse was committed without the consent of [Mrs. B] under circumstances when her resistance was overcome by force and fear; and
>
> 4. That this act occurred on or about the 26th day of April, 1982, in Johnson County, Kansas."

The State also points to Instruction No. 9, which was an expanded version of PIK Crim. 2d 54.01, as bearing on defendant's intent, but that was only the standard "natural and probable consequence" instruction which is solely evidentiary in nature. See Notes, PIK Crim. 2d 54.01.

Appellant contends these instructions are clearly erroneous, asserting rape is a specific intent crime, relying on *State v. Gonzales,* 217 Kan. 159, 161, 535 P.2d 988 (1975), and the following quote from *State v. Hampton,* 215 Kan. 907, 529 P.2d 127 (1974):

> "Either the use of force or the use of overbearing fear is a necessary ingredient of the offense of rape. The sexual act must be committed against the will and without the consent of the woman; her resistance must be overcome. Thus it is that the intent with which a marauding male approaches a member of the opposite sex in seeking sexual gratification becomes important. Is it his intent to satisfy his lust at any cost, that is, against the lady's will and by overcoming her resistance, or is it simply to find an accommodating partner? If the first be his intent, and the sexual act is accomplished by destroying resistance, the statute has been violated. On the other hand, if it be his intent merely to cajole the lady into acquiescence, and he is successful, intercourse is on a mutually enjoyable basis, and rape, it is not." 215 Kan. at 909.

In *Gonzales* the defendant was charged with rape and one of the questions before the court was the admission of evidence of other similar offenses under K.S.A. 60-455. The evidence was admitted for the limited purpose of showing intent, motive and plan of operation. The majority of this court, in reliance upon *Hampton* concluded the other crimes evidence was admissible. Justice Prager, in his dissent, stated:

"A defendant's specific intent is not a genuine issue in a rape case. Other crimes evidence offered to prove intent, where intent is not substantially in issue, amounts to no more than showing the defendant's disposition or inclination for bad conduct. This is clearly impermissible under the statute and our case law. (*State v. Cross,* 216 Kan. 511, 532 P.2d 1357.) In the present case evidence of the defendant's prior odious sexual conduct had no bearing on the matters in issue. In a rape case the burden is on the state to prove that the female victim was overcome by force and subjected to sexual intercourse without her consent. It is *her* intent and state of mind which is of supreme importance. If the defendant voluntarily commited the act of forcible sexual intercourse his specific intent is immaterial. Defendant's prior offenses have no probative value on the question of the victim's consent." 217 Kan. at 162.

In *State v. Carr,* 230 Kan. 322, 327, 634 P.2d 1104 (1981), the defendant was convicted of aggravated burglary and attempted rape and among his claims on appeal was that there was insufficient evidence to establish his specific intent to commit the crimes. A majority of the court reversed the convictions stating:

"As in *State v. Gobin,* 216 Kan. 278, 284, 531 P.2d 16 (1975), one might infer 'a general unlawful and criminal intent' but not a specific intent to rape. Admittedly, defendant's presence in the bedroom presents a closer case than *Gobin* but, even assuming that presence, which was disputed at trial, defendant was fully clothed in a room light enough that a person could have seen two figures in the bed. Finding the evidence insufficient to support the intent to commit rape which is necessary to the charge of attempted

> rape, that conviction must be reversed. Since attempted rape is the felony on which the charge of aggravated burglary is predicated, defendant's conviction for aggravated burglary must also be reversed." 230 Kan. at 327.

Thus it appears that on occasion the court has indicated that rape is a specific intent crime.

K.S.A. 21-3201(1) states:

> "Except as provided by sections 21-3202, 21-3204, and 21-3405, a criminal intent is an essential element of every crime defined by this code. Criminal intent may be established by proof that the conduct of the accused person was willful or wanton. Proof of willful conduct shall be required to establish criminal intent, unless the statute defining the crime expressly provides that the prohibited act is criminal if done in a wanton manner."

The distinction between a general intent crime and a crime of specific intent is whether, in addition to K.S.A. 21-3201, the statute defining the crime in question identifies a further particular intent which must accompany the prohibited acts. In the context of theft this distinction was mde in *State v. Gobin,* 216 Kan. 278, 531 P.2d 16 (1975), where we said:

> "We note that in addition to the *general criminal intent* mentioned in K.S.A. 1973 Supp. 21-3201(2), the acts of theft proscribed by 21-3701 must be done *with intent to deprive the owner permanently of the possession, use or benefit of particular property.*
>
> "To 'deprive permanently' as defined in the general definitions section of the code means:

> 'Take from the owner the possession, use or benefit of his property, without an intent to restore the same; . . .' (K.S.A. 1973 Supp. 21-3110[6][a].)

So it becomes apparent from the foregoing that the *specific intent* which must be established under the present charge of theft is an intent to take from the owner the possession, use or benefit of his property ($50.00 worth of swine) without an intent to restore the same." (Emphasis added.) 216 Kan. at 280.

In *State v. Clingerman,* 213 Kan. 525, 516 P.2d 1022 (1973), involving a conviction of first-degree robbery, the court stated:

> "The elements of intent required for various statutory crimes vary according to the particular crime. Where intent is a required element of the crime it must be included in the charge and in the instructions of the court covering the separate elements of that particular crime. (*State v. Carr,* 151 Kan. 36, Syl. ¶ 5, 98 P.2d 393.)" 213 Kan. at 530.

In *State v. Cruitt,* 200 Kan. 372, 436 P.2d 870 (1968), a prosecution for blackmail under K.S.A. 21-2412 (repealed 1970), the court stated the rule as follows:

> "We agree with the defendant that where the Legislature expressly refers to intent and makes it an essential element of a statutory offense, such intent must be alleged in the information. . . .
>
> "On the other hand, it has been repeatedly held that the Legislature has the power to forbid the doing of an act and make its commission criminal, without regard to the intent or knowledge of the doer. (Cites omitted.) And where an act is made a crime by statute, without any express reference to intent, this court

has held that it is not necessary to allege such intent, or any intent, but simply to allege the commission of the act in the language of the statute, and the intent will be presumed. (Cites omitted.)" 200 Kan. at 374-375.

Rape as defined in K.S.A. 21-3502 does not require as one of the statutory elements of the offense, a specific intent on the part of the defendant to commit rape and therefore there is no necessity to instruct on such a specific intent. We conclude that Justice Prager's comments in his dissent in *Gonzales* correctly state the law on this question. Language to the contrary in *Hampton* and *Carr* is hereby overruled. Having concluded that rape is not a crime of specific intent, the instructions given were not clearly erroneous and appellant's point lacks merit.

Appellant's final contention is that if rape is not a specific intent crime requiring an instruction on that intent, then K.S.A. 21-3502 is unconstitutionally vague. In *State v. Huffman,* 228 Kan. 186, 612 P.2d 630 (1980), we set forth some principles to be followed in such a challenge. We held:

"This court adheres to the proposition that the constitutionality of a statute is presumed, that all doubts must be resolved in favor of its validity, and before the statute may be stricken down, it must clearly appear the statute violates the constitution. Moreover, it is the court's duty to uphold the statute under attack, if possible, rather than defeat it, and if there is any reasonable way to construe the statute as constitutionality valid, that should be done." Syl. ¶ 1.

"The test to determine whether a criminal statute is unconstitutionally vague and indefinite is whether

> its language conveys a sufficiently definite warning as to the conduct proscribed when measured by common understanding and practice. A statute which either requires or forbids the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application is violative of due process." Syl. ¶ 5.

Appellant argues that without requiring instructions that defendant was aware of the victim's resistance and intended to engage in intercourse despite that resistance, men of ordinary intelligence might well differ as to the meaning and application of the acts prohibited by K.S.A. 21-3502. We disagree. The statute is clear, readily understandable by persons of common intelligence and as such was constitutional.

The judgment is affirmed.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 83-55375-S

State of Kansas, Appellee,

v.

Joseph William Cantrell, Appellant.

You are hereby notified of the following action taken in the above entitled case:

Motion by Appellant for leave to file request for Rehearing out of time.

GRANTED.

Motion by Appellant for Rehearing.

DENIED.

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

Date January 20, 1984

APPENDIX C

(Filed November 3, 1982)

IN THE
DISTRICT COURT OF JOHNSON COUNTY, KANSAS
CRIMINAL COURT DEPARTMENT

Case No. K-42578

STATE OF KANSAS,
Plaintiff,

v.

JOSEPH WILLIAM CANTRELL,
Defendant.

VERDICT FORM

We, the jury, find the defendant not guilty of rape.

.....
Foreman

We, the jury, find the defendant guilty of rape.

/s/ (Illegible)
Foreman

APPENDIX D

(Filed December 21, 1982)

IN THE
DISTRICT COURT OF JOHNSON COUNTY, KANSAS
CRIMINAL DEPARTMENT

No. K-42578

STATE OF KANSAS,
Plaintiff,

vs.

JOSEPH WILLIAM CANTRELL,
Defendant.

JOURNAL ENTRY

Now on this 1st day of November, 1982, this matter comes on for Jury Trial before the Honorable Gerald L. Hougland, Associate Judge of the District Court of Johnson County, Kansas. The plaintiff appears by Larry McClain, an Assistant District Attorney. The defendant appears in person and with his counsel, James Speck and Fred Farmer.

Thereupon, the parties announce themselves ready to proceed.

A jury is duly empanelled and sworn on their oath to well and truly try the facts here in issue and a verdict render in accordance with the law and evidence presented.

Thereupon, opening statements are made by the parties in this case.

Thereupon, the State commences presentation of evidence.

The Court admonishes the jury and announces the evening recess. Parties are instructed to return on the 2nd day of November, 1982 for further proceedings.

Now on this 2nd day of November, 1982, this matter comes on for continuation of Jury Trial with the parties appearing as before.

Thereupon, the State continues its presentation of evidence and rests.

Thereupon, the defendant moves the Court that certain evidence be stricken from the record. The Court, being well and duly advised in the premises considers and overrules said motion.

Thereupon, the defendant presents evidence and rests.

Thereupon, the defendant moves the Court for a directed verdict of acquittal. The Court, being well and duly advised in the premises denies said motion.

Thereupon, the Court admonishes the jury and announces the evening recess. Parties are instructed to return on the 3rd day of November, 1982, for further proceedings.

Now on this 3rd day of November, 1982, this matter comes on for continuation of Jury Trial with the parties appearing as before.

The Court instructs the jury in writing and reads said instructions to the jury at which time arguments of respective counsel are heard by the jury in the case.

The jury retires in charge of a sworn bailiff of said Court to a jury room to deliberate on their verdict.

After due deliberation the verdict of the jury is announced wherein the defendant, Joseph William Cantrell, is found guilty of the offense of Rape as that offense is in violation of K.S.A. 21-3502.

The verdict is approved by the Court and the defendant is granted ten days in which to file a Motion for New Trial.

Post trial motions in this matter are set for the 3rd day of December, 1982 at 9:00 A.M.

/s/ G. Hougland
Gerald L. Hougland, Associate Judge
Court No. 14
Johnson County District Court

Submitted By:

/s/ Larry McClain
Larry McClain/tv
Assistant District Attorney

CERTIFICATE OF MAILING

I hereby certify that a true copy of the above and foregoing Journal Entry was placed in the U.S. Mail, postage prepaid to Mr. James Speck, Attorney at Law, 1125 Grand, Suite 1804, Kansas City, MO 64106 and a copy was placed in box number 21 of the document receptacle located in the District Clerk's Office for Mr. Fred Farmer, Attorney at Law, this 21st day of December, 1982.

/s/ Larry McClain
Larry McClain

APPENDIX E

(Filed January 26, 1983)

IN THE
DISTRICT COURT OF JOHNSON COUNTY, KANSAS
CRIMINAL DEPARTMENT

No. K-42578

STATE OF KANSAS,
Plaintiff,

vs.

JOSEPH WILLIAM CANTRELL,
Defendant.

JOURNAL ENTRY

Now on this 21st day of January, 1983, this matter comes on for sentencing before the Honorable Gerald L. Hougland, Associate Judge of the District Court of Johnson County, Kansas. The plaintiff appears by Larry McClain, an Assistant District Attorney. The defendant appears in person and with his counsel, Randolph Austin.

Thereupon, the Court inquires of the defendant if the defendant is ready to proceed with the allocution of sentence. The defendant replies in the affirmative.

Thereupon, the Court inquires of the defendant whether there is any lawful cause or reason why he should not now be sentenced upon his being found guilty

of the offense of Rape, and the defendant answers in the negative. No lawful cause or reason why sentence should not now be imposed being stated and none appearing to the Court, the Court pronounces sentence as follows:

IT IS THEREFORE BY THE COURT ORDERED, ADJUDGED AND DECREED that the defendant, Joseph William Cantrell, upon his being found guilty of the offense of Rape, as that offense is defined and classified in K.S.A. 21-3502, as a class B felony and further under the provisions of K.S.A. 21-4501(b) and K.S.A. 21-4603 be punished by commitment to the custody of the Secretary of Corrections of the State of Kansas for the following term of confinement:

> The maximum term shall be twenty (20) years, which is provided by law; the minimum term is hereby set at five (5) years, which is within the limits as provided by law.

The defendant is fined in the amount of $5,000.00 and is assessed Court costs.

Thereupon, the defendant moves for bench probation in this matter. The Court being well and duly advised in the premises denies said motion.

IT IS THEREFORE BY THE COURT ORDERED, ADJUDGED AND DECREED that the defendant, Joseph William Cantrell, should be and is hereby denied probation in this matter.

Execution of sentence is stayed pending hearing of defendant's application for parole before the Board of Probation and Paroles of the District Court of Johnson County, Kansas.

IT IS FURTHER BY THE COURT ORDERFD that all witness fees in the above matter be assessed as Court costs.

/s/ G. Hougland
Gerald L. Hougland, Associate Judge
Court No. 14
Johnson County District Court

Submitted By:

/s/ Larry McClain
Larry McClain/tv
Assistant District Attorney

CERTIFICATE OF MAILING

I hereby certify that a true copy of the above and foregoing Journal Entry was placed in the U.S. Mail, postage prepaid to Mr. Randolph Austin, Attorney at Law, 201 N. Cherry, P.O. Box 1000, Olathe, KS 66061 this 26th day of January, 1983.

/s/ Larry McClain
Larry McClain